

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:**

**DAVID A. AND CARMEN T. DOHENY**

Petitioners

David A. Doheny  
For the Petition

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Board of Appeals Case No. S-2844  
(OZAH Case No. 12-33)

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Lynn McCreary

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Department of Housing and  
Community Affairs

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Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## **I. STATEMENT OF THE CASE**

Petition No. S-2844, filed on April 30, 2012, by David A. and Carmen T. Doheny, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the cellar<sup>1</sup> of an existing single-family home located at 5120 Duvall Drive in Bethesda, Maryland. The property's legal description is Lot 10, Block 9 of the Westmoreland Hills Sec. 1 Subdivision of Bethesda, and it is on land in the R-60 Zone. The tax account number is 07-00546717.

A special exception for an accessory apartment was granted by the Board of Appeals at the same location on September 22, 1997, in S-2286, but it was revoked as abandoned on April 2, 2009. Exhibit 17. On February 16, 2012, Petitioners asked the Board to reinstate the abandoned special exception, but the Board concluded that it had no power to do so and therefore denied that request on March 22, 2012. Exhibit 18. The subject petition for a new special exception was filed shortly thereafter.

The Hearing in the new case was scheduled for October 4, 2012, by notice dated May 8, 2012 (Exhibit 11). Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued September 27, 2012, recommended approval of the special exception, with conditions. Exhibit 14.<sup>2</sup>

The Department of Housing and Community Affairs (DHCA) inspected the property on July 9, 2012. Housing Code Inspector Lynn McCreary reported her findings in a memorandum dated July 18, 2012 (Exhibit 12). The inspector's preliminary report determined that the apartment has 532 square feet of habitable space, and the unit would allow for the occupancy of no more than two unrelated people or a family of three. Also submitted by DHCA was a memorandum dated October

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<sup>1</sup> Technical Staff referred to the location as the basement of the home (Exhibit 14, p. 7); however, Housing Code Inspector Lynn McCreary refers to the location as the cellar. Exhibit 12.

<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein. The report pages were not numbered, so the Hearing Examiner's references to page numbers are by physical count.

2, 2012, from Ada DeJesus of DHCA indicating that there are no other accessory apartments or registered living units in the area. Exhibit 15.

There was one letter of opposition from Scott and Joanne Pinover, of 5201 Abingdon Road, in Bethesda. Exhibit 13. That location is outside the general neighborhood as defined by Technical Staff. See Part II. A. of this report.

A public hearing was convened on October 4, 2012, as scheduled, and Petitioner David A. Doheny appeared *pro se*. Also testifying was Inspector Lynn McCreary of the Department of Housing and Community Affairs. There were no opposition witnesses. Petitioner executed an affidavit of posting (Exhibit 19), and identified photos of the premises. He adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 12), as Petitioners' own evidence (Tr. 5-6). He also agreed to meet all the conditions set forth in both reports. Tr. 5-6.

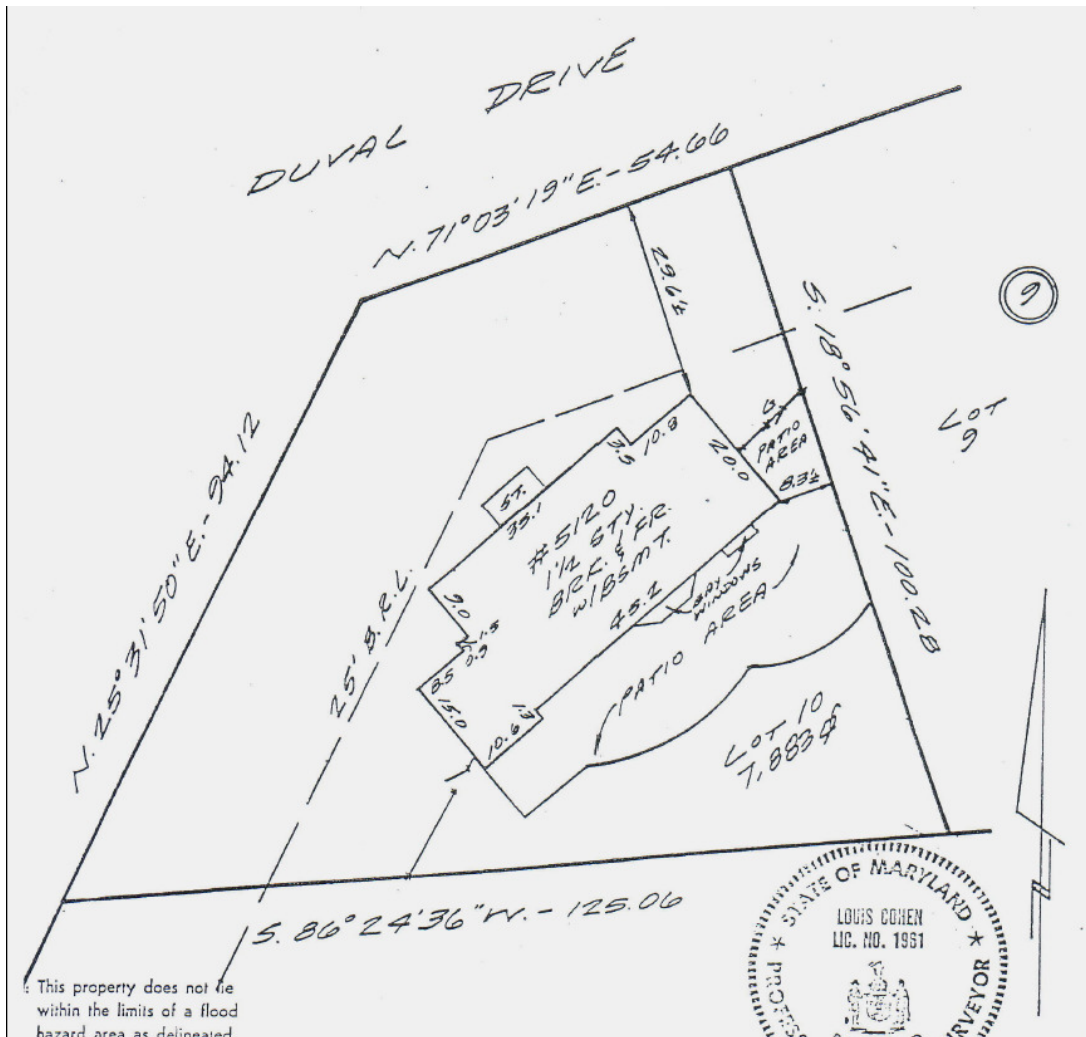
The record was held open till October 15, 2012, to await the filing of the transcript and a copy of Petitioners' deed to the premises. While the record was open, Petitioners submitted a copy of their deed to the premises. The record closed, as scheduled, on October 15, 2012.

Based on the record, the Hearing Examiner finds that the petition meets all of the statutory criteria, and he therefore recommends that the petition be granted, with conditions.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property and the Neighborhood**

The subject property is described as Lot 10, Block 9 of the Westmoreland Hills Sec. 1 Subdivision, and is located at 5120 Duvall Drive in Bethesda, at the southeast corner of the intersection of Duvall Drive and Jamestown Road. The home is in the R-60 Zone, on a 7,883 square-foot lot, as is depicted in the site plan (Exhibit 4) reproduced on the next page:



Technical Staff described the property as follows (Exhibit 14, pp. 2-3):

... [T]he existing dwelling was constructed in 1939 and has an enclosed area of 1,534 square feet. An onsite visit and GIS studies of the property revealed that the house is located on a sloped lot with lawn areas, landscape beds and individual trees. The front yard, which contains a driveway, is sited on the lowest elevation of the lot along Duvall Drive. Three stories of the home are visible from the street and two stories are visible from the rear. A set of brick steps leads from Duvall Drive to the main door of the house and a second set of steps lead from the driveway to the main door. The accessory apartment entrance is also located directly off the driveway, on the lowest level of the home. There is no access from the rear yard to the proposed accessory apartment. The subject property consists of one recorded lot in the R-60 zone. The lot was recorded on Plat No. 646 in 1936.

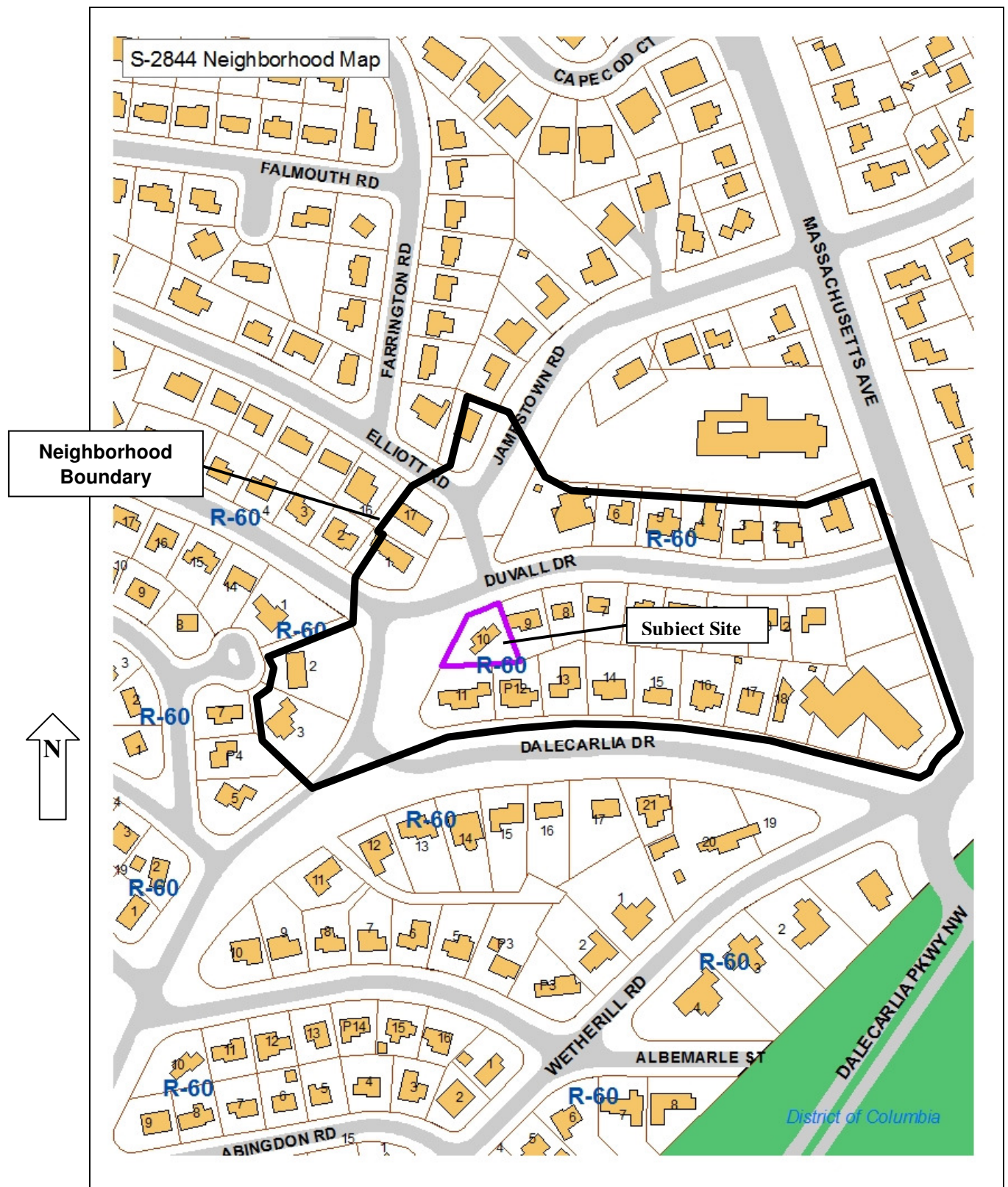
The front of the home can be seen in the following photograph from the Technical Staff report (Exhibit 14, p. 3):



**View of Main Dwelling from Duvall Drive**

Technical Staff defined the general neighborhood as bounded by Massachusetts Avenue to the east, lots on the west side of Jamestown Road to the west, lots on Duvall Drive across from the subject property to the north, and Dalecarlia Drive towards the south. The Hearing Examiner accepts this neighborhood definition, and it is shown on the next page on a Map supplied by Technical Staff. Exhibit 14, pp. 4-6.

Technical Staff reports that the defined neighborhood that surrounds the subject property generally consists of one-family detached homes. There are approximately 28 one-family homes and Westmoreland Congregational Church, all of which are zoned R-60. The neighborhood boundary (shown on the map on the next page) is depicted with a bold line to include properties that may be affected by a potential increase in density or traffic. There are no other special exceptions within the proposed neighborhood boundary, according to both Technical Staff (Exhibit 14, pp. 4-5) and DHCA (Exhibit 15).



It should be noted that Abingdon Road (*i.e.*, where the Pinovers reside), is on the extreme southern end of the map and is well outside of the defined neighborhood.

### **B. The Proposed Use**

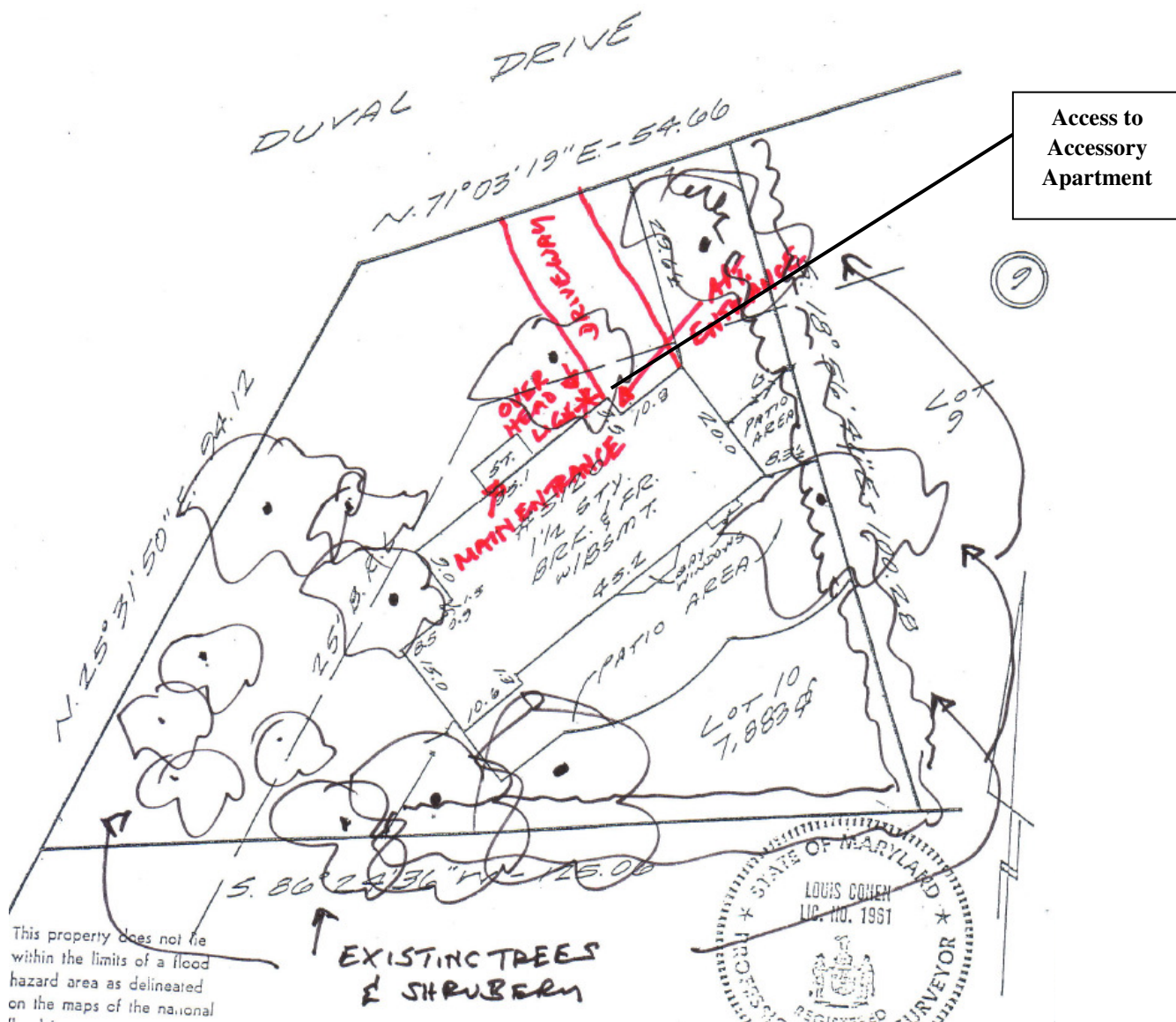
The Petitioners are seeking a special exception to allow an accessory apartment of approximately 800 square feet, located in the basement level of the existing dwelling unit. Exhibit 3. As described by Technical Staff (Exhibit 14, p. 7), a separate entrance to the apartment is located along the eastern side of the house and is distinct from the entrance to the main dwelling.

. . . To reach the entrance for the proposed accessory apartment, one would walk along the driveway, and instead of ascending the steps on the right to the front door of the house, one would walk straight ahead to find a door on the side of the house. As the photograph . . . [reproduced on page 5 of this report] suggests, the accessory apartment is virtually hidden unless a viewer is in close proximity to the home. At close proximity, the entrance has the appearance of a basement door and does not detract from the appearance of a one-family dwelling. . . .

The following photograph from the Staff report shows the entrance to the accessory apartment (Exhibit 14, p. 7):



Mr. Doheny testified that there will be no changes whatsoever to the site exterior or to the previously approved accessory apartment. Tr. 10. The Landscape and Lighting Plan he submitted (Exhibit 6) is depicted below:



Technical Staff evaluated landscaping and environmental issues as follows (Exhibit 14, p. 9):

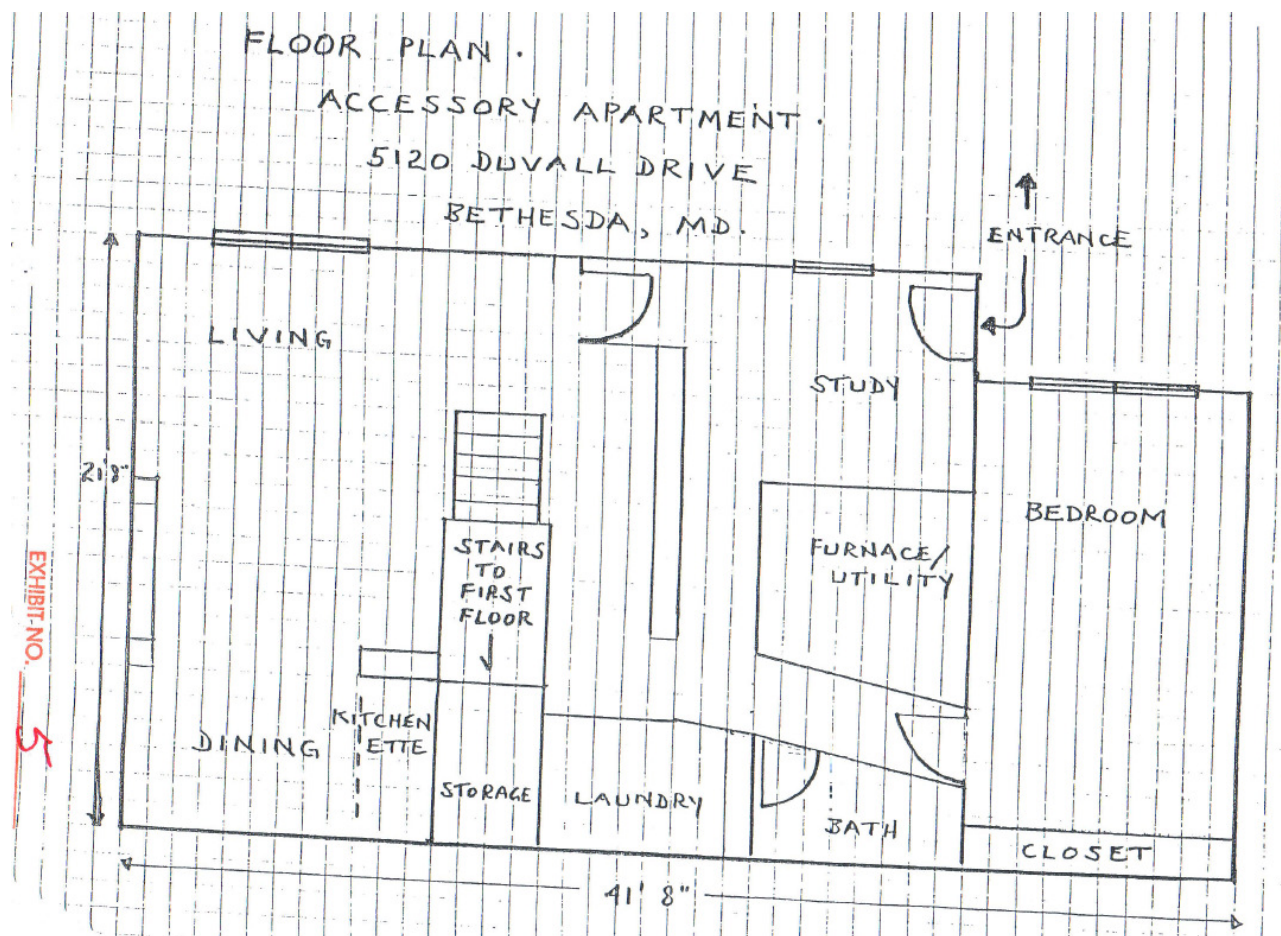
The applicant has included a Landscape and Lighting Plan in the application. The plan depicts the location of existing landscaping vegetation, exterior light fixtures and other features on the site. The site contains large trees, a patio area, landscape beds, the dwelling unit, and an asphalt driveway. No landscaping and lighting changes are proposed under the application.

There are no landscaping or environmental issues associated with this application. The Forest Conservation Law is not applicable to the subject 10,000 square foot property as defined in Chapter 22A of the Montgomery County Code. This non-applicability was previously confirmed by M-NCPPC staff on September 20, 2012. The signed form is included in . . . [Exhibit 7]. There are no champion trees on or near the subject property.

Technical Staff concluded (Exhibit 14, p. 7):

. . . Adequate lighting, residential in character, is located along the front corner of the house above the door to the proposed apartment. The accessory apartment entrance will not detract from the appearance of the neighborhood. . . .

The Floor Plan for the proposed accessory apartment (Exhibit 5) is shown below:



The overall floor area for the apartment is approximately 800 square feet, and includes a living room/dining room area, a kitchenette, a study, a bedroom, a bathroom and a laundry area. The Department of Housing and Community Affairs (DHCA) inspected the property on July 9, 2012, and

Housing Code Inspector Lynn McCreary reported her findings in a memorandum dated July 18, 2012 (Exhibit 12). The substance of her report is set forth below:

. . . The Accessory Apartment is located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. The unit measures 532 square feet of habitable space. Based on Accessory Apartment and habitability requirements, the unit would allow for the occupancy of no more than two unrelated people or a family of three.
2. There is adequate off street parking for 2 vehicles parked back to front. On street parking is available.

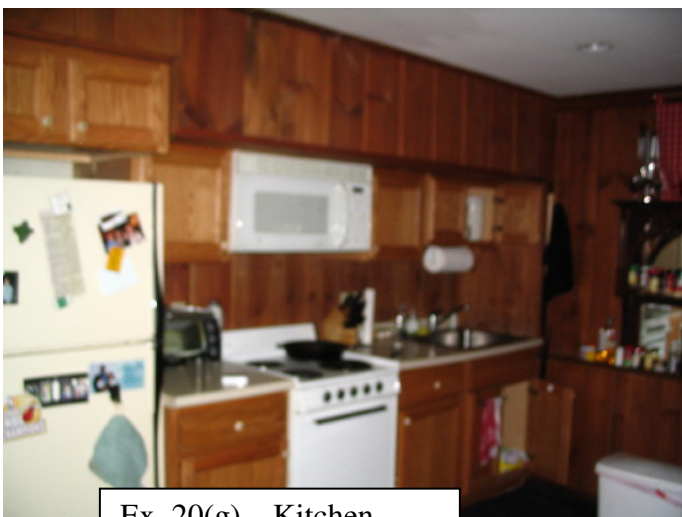
Photographs of some of the accessory apartment rooms, produced by Ms. McCreary, are reproduced below (Exhibit 20):



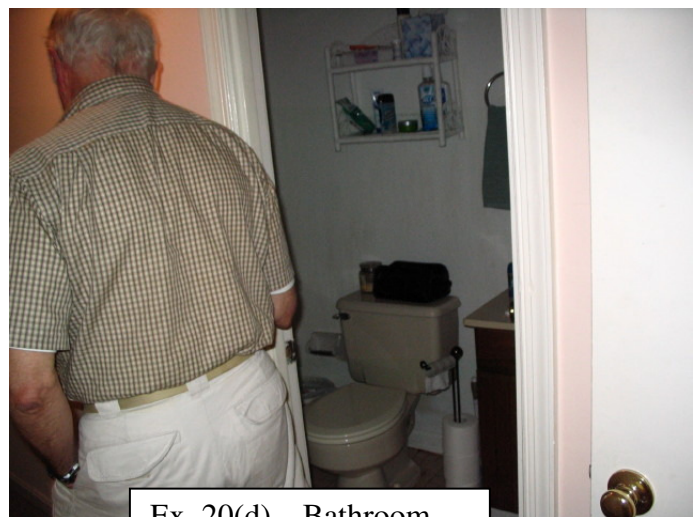
Ex. 20(f) – Living Area



Ex. 20(b) – Entrance Area



Ex. 20(g) – Kitchen



Ex. 20(d) – Bathroom

Mr. Doheny testified that he has two off-street parking spaces in the drive and that there is ample on-street parking. Tr. 12-13. Ms. McCreary confirmed that there are two parking spaces in the driveway, and there appears to be parking available on the street. The times she has been there, she has never seen a parking issue on the street. Tr. 15-16. The following photograph of the street from the Technical Staff report appears to bear out this observation (Exhibit 14, p. 4):



Technical Staff discussed the transportation issues at pages 8-9 of their report (Exhibit 14), stating:

The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities (APF) Ordinance. The existing one-family dwelling is estimated to generate one peak-hour trip during both the weekday morning and evening peak-periods. The proposed accessory apartment is estimated to generate one additional peak hour trip during the weekday peak periods. Since the number of peak hour trips, when combined, will generate fewer trips than the threshold figure requiring a traffic study (30 peak-hour trips), the proposed accessory apartment passes the Local Area Transportation Review (LATR) and is not subject to the Policy Area Mobility Review (PAMR) requirements of the APF test.

Vehicular access to the existing house and proposed accessory apartment will be from Duvall Drive. Parking for the main dwelling and the accessory apartment can be accommodated on the street fronting the property and in the asphalt driveway located on the subject property (which contains off-street parking for two vehicles parked back to front). The special exception will not have an adverse effect on vehicular and pedestrian access or pedestrian safety. . . .

Given this evidence, the Hearing Examiner finds that the proposed accessory apartment will not unduly burden local transportation facilities and that there is adequate parking to accommodate both the owners and the accessory apartment tenant.

According to the Housing Code Inspector, there are no changes that are required to meet the Housing Code, and she sees no reason why the accessory apartment special exception should be denied. Tr. 16.

Based on this record, the Hearing Examiner finds that the proposed special exception will not cause non-inherent adverse effects on the neighborhood warranting denial of the petition.

### **C. Neighborhood Response**

There has been only one letter from the community, a letter of opposition from Scott and Joanne Pinover, of 5201 Abingdon Road, Bethesda. The Pinovers oppose the petition because they feel that it will turn the site into a “multifamily property” and will adversely affect traffic and parking. Exhibit 13. The Pinovers did not appear at the hearing.

As previously mentioned, their home lies outside of the defined neighborhood, and the Hearing Examiner concludes that they will not be adversely affected by the special exception. Moreover, even if their home were in the defined neighborhood, there is no evidence that the special exception will adversely affect them. The exact same use at this location was previously approved by the Board, and there is no evidence that circumstances in the neighborhood have changed since that time.

The Pinovers’ fear that this special exception will convert the site into a “multifamily property” has been rejected by Zoning Ordinance §59-A-2.1, which uses the following language in defining a “One-family Dwelling Unit”:

A dwelling containing not more than one dwelling unit. An accessory apartment, if approved by special exception, or a registered living unit may also be part of a one-family dwelling. A one-family dwelling with either of these subordinate uses is not a two-family dwelling, as defined in this section. [Emphasis added.]

Finally, Technical Staff's review of traffic (Exhibit 14, pp. 8-9) and the Housing Code Inspector's testimony regarding the availability of parking in the area (Tr. 16), as discussed above, demonstrate that the proposed special exception will have no adverse consequences in this regard.

#### **D. The Master Plan**

The subject property lies within the area covered by the 1990 Bethesda Chevy Chase Master Plan. Technical Staff advises that the site is in the sub area designated "The Palisades." Staff notes that, on pages 25 and 26, "the Master Plan encourages a wider variety of housing types to meet the varied needs of the population and also states that an adequate supply of rental property in all housing types should be available." Exhibit 14, p. 8.

The Master Plan recommends special exception uses "that contribute to the housing objectives in the Master Plan" (p. 31, ¶ numbered 4). In fact, the Plan specifically "endorses expanding choices of housing types by provision of accessory apartments" (p. 33, ¶ numbered 4). Since the subject application furthers the Plan's general guidance, Technical Staff found the proposed use to be consistent with the Bethesda-Chevy Chase Master Plan, as does the Hearing Examiner.

An accessory apartment would maintain the existing scale and type of housing, while providing for additional housing in the area. This accessory apartment would not be visible from the street and therefore would not change the existing structure's appearance as a single-family dwelling compatible with the surrounding neighborhood.

Thus, it is fair to say that the planned use, an accessory apartment in a single-family, detached home, is not inconsistent with the goals and objectives of the Bethesda Chevy Chase Master Plan.

### III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioner David A. Doheny and from Housing Code Inspector Lynn McCreary. There was no opposition testimony.

David A. Doheny (Tr. 5-15; 22-29):

Petitioner executed an affidavit of posting (Exhibit 19), and he identified his photos of the site (Exhibit 9) and the submitted plans (Exhibits 4, 5 and 6). Tr. 13-15. He adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 12), as Petitioners' own evidence. Tr. 5-6. He also agreed to meet all the conditions set forth in both reports. Tr. 5-6.

Mr. Doheny explained why the previously approved accessory apartment at this address, S-2286, was revoked as abandoned on April 2, 2009. He and his wife are retired. The original purpose of establishing the accessory apartment in 1997 was to have somebody in the house when they were out of town for protection of the property and protection of the neighborhood. They had a series of tenants in the apartment for 11 years until 2008. In that year, his wife's mother became very ill and needed full-time help in Florida. So, they had to move out of the upper two floors and decided to rent the entire property for three years. In order to rent the entire house as a single-family residence, the housing authorities explained to them that the special exception would have to be revoked. Petitioners thought that it could just be reactivated, but the Board of Appeals said no. They therefore filed the present petition. Tr. 8-10

[A copy of the Board's April 2, 2009 resolution revoking the special exception is now Exhibit 17 in the file, and the March 22, 2012 resolution denying Petitioners' request for equitable relief is now Exhibit 18 in the file.] Tr. 9.

Mr. Doheny further testified that there would be no changes whatsoever to the site or to the previously approved accessory apartment. Tr. 10.

Mr. Doheny noted that the address of the Pinovers on Abingdon Road is three blocks away from Duvall Drive. He never had a complaint when the accessory apartment was active, and he feels that their concerns and their fears are misplaced. Nobody else has applied for an accessory apartment in the neighborhood by the records of the housing department. Tr. 11-12.

Mr. Doheny further testified that he has two off-street parking spaces in the drive and that there is ample on-street parking. Tr. 12-13.

Mr. Doheny requested that notice of the Hearing Examiner's report be e-mailed to him at DavidADoheny@gmail.com. Tr. 24-26.

Housing Code Inspector Lynn McCreary (Tr. 15-22):

Housing Code Inspector, Lynn McCreary, testified that she inspected the premises and that her findings are set forth in her report of July 18, 2012 (Exhibit 12). She stated that the apartment measures 532 square feet of habitable space, and that would allow for the occupancy of no more than two unrelated people or a family of three. There are two parking spaces in the driveway, and there does appear to be parking available on the street. The times she has been there, she has never seen a parking issue on the street. Tr. 15-16.

According to Ms. McCreary, there are no changes that are required to meet the Housing Code, and she sees no reason why the accessory apartment special exception should be denied. Tr. 16.

Ms. McCreary then identified pictures of the premises that she had taken (Exhibit 20). Tr. 17-22.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-

specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibit 14).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the

proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 14, p. 11):

- (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall;
- (2) the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as habitable space under the applicable code provisions;
- (3) a separate entrance and walkway and sufficient exterior lighting;
- (4) sufficient parking;
- (5) the existence of another household on the site with resulting additional activity including greater use of outdoor space and more pedestrian traffic and parking activity; and
- (6) the potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found (Exhibit 14, pp. 11-12):

Under the subject application, there are no adverse effects that will negatively impact the community above those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is not identifiable from the street. The apartment will provide space and facilities necessary for an apartment use.

The accessory unit has its own entrance separate from the entry to the main dwelling. The apartment entrance appears typical of a side basement entrance to a

single family house, as such it is difficult to distinguish it from any other neighborhood home. The entrance of the accessory apartment will be illuminated consistent with typical residential standards.

Vehicular parking for the accessory apartment will be located either in the driveway or on the public street.

Based on these findings, Staff concluded (Exhibit 14, p. 12):

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use.

There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Staff's assessment. Considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

### **B. General Conditions**

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31.

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the Bethesda-Chevy Chase Master Plan, approved and adopted in 1990. The Master Plan recommends special exception uses “that contribute to the housing objectives in the Master Plan” (p. 31, ¶ 4). In fact, the Plan specifically “endorses expanding choices of housing types by provision of accessory apartments” (p. 33, ¶ 4).

An accessory apartment would maintain the existing scale and type of housing, while providing for additional housing in the area. Technical Staff therefore found the proposed use to be consistent with the Bethesda-Chevy Chase Master Plan, as does the Hearing Examiner.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The accessory apartment will be located in an existing dwelling and will not require any external changes. It therefore will maintain its residential character. There will be sufficient parking, considering the two driveway spaces and the on-street parking.

Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other accessory apartments in the defined neighborhood, and the addition of this use will not affect the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that “Based on the nature of the use, the proposed special exception will cause no objectionable noise, vibrations, fumes, odors, dust, or physical activity. The use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 14, p. 13. Since the use will be indoors and residential, the Hearing Examiner finds that it will cause no objectionable effects at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: As discussed above, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 14, p. 14), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
  - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision, and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit 14, pp. 14-15. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic as the use will not generate a substantial increase in either form of traffic," the Hearing Examiner so finds. Exhibit 14, p. 15.

### C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

***Sec. 59-G-2.00. Accessory apartment.***

*A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:*

***(a) Dwelling unit requirements:***

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

**Conclusion:** Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*
- (i) The lot is 2 acres or more in size; and*
  - (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

**Conclusion:** The apartment is located in the cellar of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

**Conclusion:** No new addition or extension of the main dwelling is proposed. The accessory apartment will be located in an existing dwelling.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1939. Exhibit 14, p. 16. It therefore meets the “5 year old” requirement.

- (5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use will not violate any of the provisions of this subsection.

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment will preserve the appearance of a one-family dwelling. The apartment entrance will be separate from the main entrance and substantially screened with landscaping. As noted by Technical Staff, the apartment entrance will have the appearance of a typical basement entry to a one-family home. There will thus be no change to the home’s residential appearance. Exhibit 14, pp. 16-17.

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external improvements are planned by Petitioners.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The accessory apartment, at 800 square feet (532 square feet of which is habitable), will clearly be subordinate to the main dwelling, which according to Technical Staff, has a total floor area of 1,534 square feet. Exhibit 14, p. 17.

**59-G § 2.00(b) Ownership Requirements**

*(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioners will live in the main dwelling unit on the property.

*(2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: According to Petitioners' deed (Exhibit 21) and the Maryland Tax Records (Exhibit 16), Petitioners purchased the property in 1987. The one-year rule has therefore been satisfied.

*(3) Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioners will receive compensation for only one dwelling unit as a condition of the special exception.

*(4) For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioners are the owners of the property.

*(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable.

**59-G § 2.00(c) Land Use Requirements**

- (1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

**Conclusion:** The subject lot is approximately 7,883 square feet in size, and therefore satisfies this requirement. According to Technical Staff, the subject property conforms to all applicable development standards of the zone.<sup>3</sup> Exhibit 14, p. 9. The following table from the Technical Staff report summarizes the relevant development standards for the application. Exhibit 14, p. 10.

**Development Standards for the R-60 Zone**

Development Standards	Min/Max Required	Proposed	Applicable Zoning Ordinance Provisions
Minimum Lot Area	6,000 sq ft	7,883 sq ft	§59-C-1.322 (a)
Minimum Lot width at street line	25 ft	56 ft	§59-C-1322 (b)
Minimum lot width at front building line	60 ft min	82 ft	§59-C-1322 (b)
<b>Setbacks</b>			
- front	25 ft min	29.6 ft	§59-C-1.323
- side	8 ft min (7 ft per 59-B-5.3) 18 ft sum of both sides	8.3 ft side 15 ft side 23.8 sum of both sides	§59-C-1.323
- rear	20 ft min	40 ft	§59-C-1.323
Maximum Building Height	35 ft	1.5 stories	§59-C-1.327
Maximum Building coverage	35%	Approximately 14%	§59-C-1.328
Maximum Floor area for accessory apartment	1,200 sq ft	532 sq ft	§59-G-2.00 (a) (9)

<sup>3</sup> Due to the lot's irregular shape, staff referred to a Montgomery County Department of Permitting Services Diagram, which is included in Attachment D [to the Staff report], to determine the rear yard setback. Using this diagram, staff determined that the rear yard could be measured from an imaginary 10 foot line that connects the two side lot lines. From this line, the rear yard setback measured approximately 40 feet. Staff believes the rear yard setback does conform to the standard of the zone when using this means of analysis. Exhibit 14, pp. 9-10.

- (2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: As previously stated in this report, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses since there are no other accessory apartments in the neighborhood.

- (3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*
- (i) More spaces are required to supplement on-street parking; or*
  - (ii) Adequate on-street parking permits fewer off-street spaces.*
- Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: As discussed in Part II.B. of this report, there are two off-street spaces on Petitioners' driveway, and there is ample on-street parking. Technical Staff found that "The subject property has adequate parking area for at least two vehicles in the driveway accessed from Duvall Drive. On street parking also exists along the front of the property." Exhibit 14, p. 19. The Housing Code Inspector agreed. Tr. 15. The Hearing Examiner so finds.

#### **D. Additional Applicable Standards**

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 12) found that no modifications were needed, but restricted occupancy. Petitioners have agreed to meet all conditions, and will comply with directives of the Housing Code Inspector. Tr. 5-6.

## V. RECOMMENDATION

Based on the foregoing analysis, I recommend that the Petition of David A. and Carmen T. Doheny, BOA No. S-2844, which seeks a special exception for an accessory apartment to be located at 5120 Duvall Drive, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;
2. The Petitioners must comply with the conditions set forth in the Memorandum of Lynn McCreary, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 12):
  - a. The unit measures 532 square feet of habitable space. Based on Accessory Apartment and habitability requirements, the unit would allow for the occupancy of no more than two unrelated people or a family of three.
  - b. There is adequate off street parking for 2 vehicles parked back to front. On street parking is available.
3. Petitioners must comply with the determination of the Housing Code Inspectors as to limits on occupancy in the accessory apartment and must comply with any other directions of the Housing Code Inspectors to ensure safe and code-compliant occupancy;
4. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
5. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
6. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: November 9, 2012

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner